Office of Chief Counsel
Internal Revenue Service

memorandum

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date:

to: Gerald M. Molina, Acting Case Manager, LMSB 1585

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from: Joyce M. Marr, Attorney (LMSB) Laguna Niguel
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subject: Employment Taxes of [redacted]
EIN: [redacted]
Years: [redacted] through [redacted], inclusive
Statute of Limitations Date: [redacted]

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated June 19, 2001. This memorandum should not be cited as precedent.

ISSUES

1. Whether the successor in interest to the former parent of a consolidated group may agree in a closing agreement to be liable for the employment tax liabilities of the former parent and the other former members of the consolidated group.

2. If the answer to the first issue is in the affirmative, whether the closing agreement would be effective with respect to liabilities of former members of the consolidated group for which the statute of limitations has expired.

RECOMMENDED CONCLUSIONS

1. Yes, the successor in interest to the former parent of a consolidated group may agree in a closing agreement to be liable

for the employment taxes of the former parent and other former members of the consolidated group.

2. Yes, the closing agreement would be effective with respect to liabilities of former members of the consolidated group for which the statute of limitations has expired.

FACTS[1]

From at least [redacted], through [redacted], [redacted] (EIN [redacted]) (sometimes referred to herein as "[redacted]") was the common parent of a consolidated return group.

Effective [redacted], [redacted] was merged into [redacted] ([redacted]) (formerly known as [redacted]) (sometimes referred to herein as "the successor to [redacted]").

Exam has recently completed an audit of the former [redacted] consolidated group for its fiscal years ended [redacted], [redacted], [redacted], and [redacted], and its short return period ended [redacted].

Affixed hereto as Exhibit A is a Consent to Extend the Time to Assess Employment Taxes (Form SS-10) which extended until [redacted], the statute of limitations for FICA, FUTA and income tax withholding liabilities of [redacted] and the subsidiaries listed on the "Rider to Form SS-10" for the years [redacted], [redacted], [redacted] and [redacted]. Attached hereto as Exhibit B is a list providing a brief description of the current status of each former subsidiary of [redacted] listed on the rider through the middle of [redacted], to the extent that we have such information.[2] As can be seen from the list, a number of the former members of the group have been sold to third parties.

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[1] The facts stated herein are based on the documents and information you provided. We have not undertaken any independent investigation of the facts of this case. If the facts stated herein are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

[2] Where there is no information appearing on the list next to the name of a former subsidiary, we have no information readily available as to the status of the subsidiary.

The audit of the employment taxes of the former [redacted] consolidated group has been completed. During the audit, the employment tax agent and the individual representing the successor to [redacted] often found it difficult, if not impossible, to determine the individual members of the former consolidated group against which some of the employment tax liabilities should be assessed. This was due to deficiencies in the records made available to the Service by the successor to [redacted]. The successor to [redacted] acknowledged the deficiencies in the records. It decided that, as the successor to [redacted], it would accept the liability resulting from all agreed adjustments, rather than attempting to ascertain from its records whether some of the adjustments should increase the employment tax liabilities of other former members of the [redacted] consolidated return group.

The successor to [redacted] agreed to the proposed employment tax adjustments by signing an Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Excise or Employment Tax) (Form 2504) captioned in the name of [redacted], a copy of which is affixed hereto as Exhibit C, and paid the resulting tax liabilities. The Form 2504 was executed on [redacted].

The Service has processed and posted a payment received from the successor to [redacted] for the full amount of the liabilities reflected on the Form 2504. However, before assessing the taxes agreed to in the Form 2504, the Service wishes to further protect the government's interest by executing a closing agreement with the successor to [redacted] to preclude the latter from possibly contesting (through a claim for refund) a portion of the agreed liabilities as being in fact the liabilities of the former subsidiaries of [redacted]. When the Form 2504 is forwarded to the Examination Support Processing (ESP) Section for processing for assessment, the Employment Tax Group would like to include such a closing agreement with the Form 2504.

Consents extending the statute of limitations on assessment of employment taxes for the years under audit are currently in effect only with respect to the employment tax liabilities of [redacted] and [redacted] of its former subsidiaries. Copies of those consents are affixed hereto as Exhibit D. The consents extend the statute of limitations until [redacted]. Exam plans to secure no further consents extending the statute of limitations on assessment.

DISCUSSION

In the context of a consolidated group, each member of the group is severally liable for the consolidated income tax liability of the entire group for any tax year during any part of which it is a member. Treas. Reg. § 1.1502-6(a). When a tax is severally owed by two or more taxpayers, the Service has the authority to collect the full amount of the unpaid tax from any of the taxpayers. See McCray v. United States, 910 F.2d 1289 (5th Cir. 1990).

The members of a consolidated group, however, are separately liable as taxpayers for their own liabilities for other taxes, such as employment taxes and excise taxes. See, e.g., I.R.C. § 1502 (authorizes consolidated returns only for income tax liability).

Because the parent of a consolidated group is not liable for the employment tax liabilities of its subsidiaries, one of the issues to be resolved herein is whether a parent corporation (or its successor in interest) may agree in a closing agreement to assume the employment tax liabilities of its subsidiar(ies).[3] In light of the fact that a portion of the liability which the successor to [redacted] agreed to in the Form 2504 may be attributable to former subsidiaries of [redacted] for which the statute of limitations has expired, another issue facing us is whether a closing agreement determining liability for barred years is effective.

Assumption of liabilities of another taxpayer in closing agreement

There are no authorities dealing with whether by means of a closing agreement a taxpayer may in essence assume the tax liability of another taxpayer.[4] Therefore, we have examined the

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[3] In the instant case, we believe that this question arises only to the extent it is possible to identify an employment tax liability as being that of one of [redacted]'s former subsidiaries. To the extent that it is uncertain whether a liability is that of [redacted] or one its subsidiaries, we believe that there is a legitimate dispute concerning [redacted]'s employment tax liabilities which a closing agreement may be used to resolve.

[4] Cf. G.C.M. 39385 (Feb. 15, 1985) (considering whether a closing agreement with a sponsor of a defective master plan imposing sanctions on the sponsor is enforceable in connection with granting relief under I.R.C. § 7805(b) to the trusts, the

statutory language and legislative history to ascertain whether Congress intended for a closing agreement to be used for this purpose.

I.R.C. § 7121(a) provides:

> The Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

Accordingly, a closing agreement is to relate to only the tax liability of the person who is executing the agreement. Moreover, the Treasury Regulations set forth in the margin also indicate that a closing agreement may only relate to the tax liability of the person entering into the agreement.[5]

Section 606 of the Revenue Act of 1928 was the predecessor to current Section 7121; its origin was in the Revenue Act of 1921. In our review of the legislative history, we have found nothing directly addressing whether a closing agreement may be used to have one taxpayer agree to assume the tax liability of another taxpayer. However, H.R. Rep. No. 1860 (75th Cong., 3d Sess. 67) (1939-1 C.B. (Part 2) 728, 776)), which explains the

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employers, and the plan participants.)

[5] Treas. Reg. § 301.7121-1(a) provides in pertinent part:

> The Commissioner may enter into a written agreement **with any person relating to the liability of such person** (or of the person or estate for whom he acts) **in respect of any internal revenue tax** for any taxable period....

(emphasis added).

Treas. Reg. § 601.202(a)(1) provides in pertinent part:

> Under section 7121 of the Code and the regulations and delegations thereunder, the Commissioner .... may enter into and approve a written agreement with a person **relating to the liability of such person** (or of the person or estate for whom he acts) **in respect of any internal revenue tax** for any taxable period.

(emphasis added).

reason why the words "ending prior to the date of the agreement" were eliminated from Section 606, states:

> Section 606 of the Revenue Act of 1928 gives the Commissioner authority to execute a closing agreement with any person relating to **his** liability in respect of any internal-revenue tax . . . .

At first blush, it may appear from the foregoing that Congress did not intend that a closing agreement be executed in which a taxpayer assumes the liability of another taxpayer. However, we believe that the statute (as well as the regulations and legislative history referred to above) should not be so narrowly construed. Rather, we believe that the language should be construed as limiting the binding effect of a closing agreement to the taxpayer who executes it (regardless of whether the liability to which the agreement pertains was originally that of the taxpayer). This limited effect of a closing agreement was noted by the Chief Counsel of the Bureau of Internal Revenue John P. Wenchel as early as 1938, when he noted "[a closing agreement] is *res judicata* only as to the taxpayer who is a party to the closing agreement." Wenchel, The Treasury's New Powers as to Closing Agreements *and* Some Thoughts Concerning Termination of Tax Exemption, 16 The Tax Magazine 651 (1938).

Finally, since a closing agreement requires no consideration to be valid (Perry v. Page, 67 F.2d 635 (1st Cir. 1933), cert. denied 292 U.S. 632 (1934)), the fact that the successor to [redacted] is in fact not liable for the employment tax liabilities of [redacted]'s subsidiaries which would be assumed by it under the agreement would not render the agreement unenforceable.

Barred Years

There also is a dearth of authority dealing with whether a closing agreement determining liability for barred years is valid.

IRM, Handbook No. 8(13)10(1), Closing Agreement Handbook, Section 810 states:

> (1) The matter of whether or not a closing agreement determining tax liability for barred years is effective and enforceable has not been clearly covered by the statute, regulations or judicial precedent. The principal case that appears to stand for the proposition that such an agreement is valid is Dubinsky v. Becker, 64 F. 2d 601 (8th Cir. 1933), aff'g X-2 C.B. 286 (E.D. Mo. 1931). Particularly in point is the language of the lower court

> which may be found at X-2 C.B. at 290 as follows: 'The statute clearly points out the instances in which the agreement may be questioned. They are for fraud, malfeasance and misrepresentation. It does not say that such an agreement may be overturned upon a showing that a part, or all, of the taxes paid were assessed after they were barred by limitation. If it had been so intended the legislature would have said it. It didn't. So there can be no recovery unless the agreement is vulnerable for one or more of the above reasons.'

The conclusion reached by the Ninth Circuit in an unpublished Memorandum opinion in In re Guy Miller, 81 F.3d 169 (9th Cir. 1996) [96-1 U.S.T.C. ¶ 50,236], aff'g 174 B.R. 791 (9th Cir. BAP 1994), lends support to the argument that a closing agreement executed for barred years is valid.

The debtor in In re Guy Miller contended that a closing agreement should be set aside as a result of alleged misrepresentations of the Service. The debtor was a partner in a TEFRA partnership. The tax matters partner (TMP) had executed consents extending the statute of limitations on assessment for the tax years 1984 through 1990. The debtor argued that the TMP lacked authority to execute the consents since he was the subject of a criminal tax investigation at the time he signed the consents. The Service, on the other hand, argued that the TMP's designation as such was not terminated since he had not received notification from the Service that he was under a criminal investigation and that his partnership items were converted to nonpartnership items. The Ninth Circuit did not address the issue whether the TMP's status as such had expired. It did, however, address the debtor's argument that since the partnership no longer had a TMP, the Service had to fulfill the fiduciary duties of the TMP and advise him of the statute of limitations defense as follows:

> If a partnership fails to have a TMP, and the IRS does not designate one, the IRS must deal with the partners individually. See 26 U.S.C. §6231(b). The IRS does not become the TMP. Even if Hoyt discontinued being the TMP, the IRS did not become the TMP and did not breach any fiduciary duties to [the debtor]. [The debtor's] closing agreement with the IRS is therefore 'final and conclusive.' Pack v. United States, 992 F.2d 955, 960 (9th Cir. 1993).

Thus, it appears that the Ninth Circuit considers a closing agreement covering barred years enforceable.

This advice has been coordinated with the Office of Chief Counsel. Please contact the undersigned at telephone number (949) 360-2688 if you have any questions or comments concerning the foregoing.

JOYCE M. MARR
Attorney (LMSB)

Attachments: As stated